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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Implementation of the Local Competition	)	**CC Docket No. 96-98**
Provisions in the Telecommunications Act	)	
of 1996	)	

MCI WORLDCOM'S REPLY COMMENTS ON FOURTH FURTHER NOTICE

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EXECUTIVE SUMMARY

The incumbent local exchange carriers' ("ILECs'") Comments provide no grounds in law or policy to adopt a blanket rule prohibiting the use of unbundled network elements for an entire class of telecommunication services.

The ILECs' submissions rest on a series of legal and factual claims that the Federal Communications Commission ("Commission" or "FCC") already has rejected as unsound or untrue. Remarkably, for the most part the ILECs do not even acknowledge these prior rulings. Thus:

> The ILECs' central thesis is that section 251 was intended to govern only local competition, so it would be error for the Commission to impose unbundling obligations that would allow requesting carriers to use network elements to provide access services. But the Commission already squarely held that a "no access" use restriction would be unlawful because section 251(c)(3)'s unbundling obligation expressly applies to "telecommunications services" generally, and not to "intraLATA telecommunications services" exclusively. *Local Competition Order* ¶ 356.
>
> The ILECs claim that section 251(g) requires the Commission to impose a use restriction to preserve its access charge regime. But the Commission previously rejected this argument, finding that "this provision does not apply to the exchange access 'services' requesting carriers may provide themselves or others after purchasing unbundled elements." *Id.* ¶ 362.
>
> The ILECs claim that section 252(i) requires or at least authorizes the Commission to restrict leasing in order to preserve tariffed access service rates. But the Commission previously rejected this argument, finding that "our authority to set rates for [interexchange] services is not limited or affected by the ability of carriers to obtain unbundled elements for the purpose of providing interexchange services." *Id.* ¶ 358.
>
> The ILECs insist that the statute's "impairment" provision requires the Commission to unbundle elements only for specified uses. But in the *UNE Remand Order* the Commission did not undertake any such evaluation, but instead concluded that the statute required it to unbundle an element for *all* telecommunication uses if requesting carriers could show, principally, whether they were impaired in their ability to provide the telecommunication services they wished to provide without the element. *E.g., UNE Remand Order* ¶¶ 54, 321, 332.

The ILECs insist that in considering impairment the Commission must consider the ability of requesting carriers to purchase ILEC services that could substitute for leasing ILEC elements. The Commission previously reached the opposite conclusion. *Id.* ¶ 354.

The ILECs insist that CLECs are not impaired merely because they cannot purchase access services at TELRIC rates. The Commission previously reached the opposite conclusion. *Id.* ¶ 341 n.673.

The ILECs insist that the number of IXC and third-party entrance facilities proves that requesting carriers are not impaired if they are denied ILEC transport over these same routes. The Commission previously rejected exactly the same claim based on exactly the same evidence. *Id.* ¶ 347.

The ILECs insist their special access revenues must be protected because they are a source of universal service subsidy. The Commission has repeatedly held that they are not. *E.g. First Report and Order, In re Access Charge Reform*, 12 F.C.C.R. 15982, ¶ 404 (1997) ("*Access Charge Reform Order*").

The ILECs insist that the high price of transport should be preserved because it encourages third parties to build competing transport. The Commission previously rejected this argument both as a general matter and specifically as it applies to transport facilities. *UNE Remand Order* ¶¶ 112, 368.

Finally, the ILECs insist that TELRIC prices are so substantially below true "competitive prices" as to be confiscatory, and that therefore making access available at a TELRIC price would wreak havoc with what is already a competitive market in access services. But this is not a proceeding which the ILECs may properly use as a bootstrap to continue their assault on the TELRIC pricing methodology.

The ILECs' more general policy arguments each rest on one or the other of these discredited claims. But even taken in the abstract, their principal arguments are incoherent. First, they assert that under the "impairment" standard requesting carriers cannot prove their entitlement to unbundled network elements that could be substituted for access services, because "these services are now competitive." Bell Atlantic Comments 10. Second, they assert that their access services competing successfully in this competitive market "indisputably . . . help to finance the low cost of basic service," SBC Comments 15, such that if they were required to provide the facilities that are used to offer these services at TELRIC rates, the ILECs would be unable to continue to fund their universal service obligations.

But these are mutually exclusive propositions, at least to the extent they are something other than another misplaced attack on TELRIC. If the access market is competitive, then the price of access services must be approaching the cost of providing those services. If that is the case, ILECs will suffer no substantial economic consequences when they are required to lease the underlying facilities at cost-based rates. If, on the other hand, the ILECs really stand to lose all of the revenue they claim if they are required to offer elements for lease at cost-based rates, then their impairment argument, and the free market rhetoric upon which it is based, lacks merit.

As it happens, both ILEC propositions are false. To prove the access market is fiercely competitive, the ILECs republish portions of a so-called "fact report" first published in the opening phase of this proceeding. But the Commission rejected the conclusions the ILECs derived from this report a few short months ago, finding that CLECs would be impaired without access to these very same transport and loop facilities. That conclusion was sound, and the Commission has stated it will not review it for three years.

The ILECs' second claim is at least correct in part – except in densely populated areas in which there is a more competitive market in access, access service charges are indeed greatly in excess of cost, and unbundling would result in lower consumer prices. But this is a powerful argument in support of unbundling those underlying facilities. The point of the Act is to bring lower prices to consumers, not to preserve artificially high prices.

But in other respects, the ILECs' second claim is as groundless as its first. The ILECs' supra-competitive profits do not support universal service or any other socially useful purpose. Instead, they harm consumers, and (especially in conjunction with the Commission's *Pricing Flexibility Order*) allow ILECs to engage in price squeezes and similar anti-competitive conduct. Additionally, the ILECs greatly overstate the amount of their potential revenue loss, and there is

no risk that CLECs could "flash cut" away from these ILEC services and leave ILECs with a sudden unanticipated revenue shortfall. Long-term access service commitments and technical and administrative requirements relating to UNE provisioning, billing and repair assure that the evolution to a more competitive and rational market will take place gradually, and not all at once. Nor can the ILECs fairly claim they lacked notice of the Commission's actions: the Commission first ruled that the unbundling rules apply to CLEC access services over three years ago.

Neither would it be sound policy to preserve grossly inflated prices as a way to force competitors to dig up roads and build economically inefficient competing transport facilities. In any event, because the high-traffic locations in which it is economic for CLECs to build competing facilities are (unsurprisingly) the same locations in which ILECs provide more competitively priced access services, unbundling will drive down prices most in those other locations which lack the concentrated traffic that would justify additional construction. To the extent that competition has had any effect on special access rates, there have been modest reductions in DS3 and higher capacity rates. But there is little competitive pressure on access rates for DS1's because it is not economically feasible for new entrants to build out at the DS1 level. As a result, DS1 special access rates generally far exceed UNE rates. Thus, it is the price of access service provided by DS1 lines that will most decline when the Commission enforces the law, but CLECs cannot economically construct competing low capacity facilities, regardless of the Commission's unbundling policies. Leasing therefore will not supplant facilities-based competition where it exists, but rather will allow competition to develop in those places where the network configurations prevent facilities-based competition.

Finally, while the ILECs make false and unsupported policy claims about the effects of unbundling on interLATA services, they steadfastly ignore the deleterious effect their proposal

would have on *local* service. The ILECs insist that CLECs who are impaired without the ability to make use of ILEC facilities should be required to construct two completely distinct overlapping networks – one for local traffic composed of unbundled network elements, and one for interLATA traffic made up of tariffed ILEC access services. ILECs, of course, use these same facilities more efficiently – they do not segregate traffic in their network based on its "use." Even without the benefit of these discriminatory practices, the ILECs enjoy economies of scale and scope that no CLEC can approach. With their "use restriction" rules, ILECs deprive CLECs of whatever meager economies of scale they might generate by providing both local and long-distance service over the same network. In that way, the proposed use restriction damages the prospects for local competition every bit as much as it deprives users of access services the lower prices the Act was designed to promote. It is bad policy as well as bad law.

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I. USE RESTRICTIONS ARE UNLAWFUL.

The ILECs' Comments do not successfully rebut the Commission's previous conclusion that the plain language of section 251(c)(3) "permits interexchange carriers and all other requesting telecommunications carriers to purchase unbundled elements for the purpose of offering exchange access services." First Report and Order, *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499, ¶ 356 (1996) (*"Local Competition Order"*); *see also id.* ¶ 484. The ILECs' central legal argument to the contrary ignores both the language of the Act and the Commission's previous conclusion. According to the ILECs, the Act's unbundling obligations were intended "to jump start competition in the traditional monopoly local exchange market." U S WEST Comments 22. Consequently, they assert, requesting carriers should not be allowed to provide access services through UNEs because to do so does not further that purpose. *See also id.* 15, SBC Comments 17, n.31. But as the Commission previously explained, section 251(c)(3) commands the unbundling of elements for carriers who wish to provide "telecommunications services" generally, and not uniquely "intraLATA telecommunications services." Statements by

Congressmen that the Act was intended to open local markets, *see* U S WEST Comments 15 n.35, are not to the contrary, and in any event do not trump this statutory mandate.[1/]

Next, the ILECs argue that notwithstanding the unambiguous language of section 251(c)(3), under either section 251(g) or section 252(i) the Commission must maintain "restrictions on the use of UNEs . . . until the Commission fully resolves the complex, interrelated issues addressed in its separations, access charge and universal service reform proceedings." Joint Comments of National Exchange Carrier Ass'n, et al. 4-5. But universal service subsidies are far more implicated by the decision to unbundle the local loop, and it cannot be plausibly argued that Congress permitted the FCC to delay that critical unbundling requirement indefinitely until the completion of universal service reform. The Act's own timing sequence shows that this is an impermissible construction of these provisions, since Congress required the FCC to enact unbundling rules *before*, and not *after*, the completion of universal service reform. The Commission was therefore undoubtably correct when it previously concluded that section 251(g) requires that universal service reform be considered along with access charge reform, but that "this provision does not apply to the exchange access 'services'

1/ Only SBC even acknowledges the Commission's previous conclusion. SBC Comments 27. It argues that that conclusion was reversed by the Supreme Court in *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999). But no party challenged that conclusion at the Supreme Court, and the Supreme Court never addressed it. It reversed only the Commission's unrelated interpretation of the "impair" standard found in section 251(d)(2)(B), and considered section (c)(3) only to note that the Commission has misunderstood the role "technical feasibility" played in that provision. 119 S. Ct. at 736. SBC asserts that these very different statutory construction issues must be related to the one at issue here because they were addressed together in Comments preceding the *Local Competition Order* by the Illinois Commerce Commission and the Texas Office of Public Utility Counsel. SBC Comments 28. But the Commission's construction of section 251(c) stands or falls on its own merits, without regard to the advocacy of the parties that proposed it. In any event, the Illinois Commerce Commission's statement that "section 251(c)(3) does not place a limit on the nature of a request or the use of the network elements once acquired" is a sound one and the FCC was well advised to follow it.

requesting carriers may provide themselves or others after purchasing unbundled elements." *Local Competition Order* ¶ 362. And it was undoubtably correct in concluding as well that "our authority to set rates for these services [set out in section 252 (i)] is not limited or affected by the ability of carriers to obtain unbundled elements for the purpose of providing interexchange services." *Id.* ¶ 358.

Notwithstanding all of this, the ILECs argue that use restrictions must be permissible, since the Act's "impairment" provision calls for the Commission to consider the "services [a carrier] seeks to offer," § 251(d)(2), so "a UNE's availability must necessarily be limited to those types of services for which the UNE satisfies the impairment test." U S WEST Comments 3. *See also, e.g.*, SBC Comments 8; GTE Comments 7. Indeed, they go so far as to argue that in light of this language it would be unlawful for the Commission *not* to consider restricting unbundling to specified uses, and that as part of this proceeding the Commission must therefore "conduct[] an impairment analysis targeted at special access services." US WEST Comments 4.

As with the ILECs other legal arguments, this claim too is inconsistent with the statute and with past Commission practice.

First, during the *UNE Remand* proceeding not a single commenter asked the Commission to consider discretely the various uses to which each network element could be put, and to unbundle that element only on a "use by use" basis. Nor did the Commission engage in any such inquiry for any network element. Having failed to propose this construction of the Act in a timely manner, the ILECs have no basis to argue that the Commission should apply it here uniquely to the loop and transport elements.[2/]

2/ The ILECs wrongly insist that the Commission did engage in a use-by-use inquiry in the *UNE Remand* Order. Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *In re Implementation of the Local Competition Provision of the*

Second, section 251(d)(2) expressly requires the Commission to determine what "network elements should be made available for purposes of subsection (c)(3)." It does not state that the Commission should consider which particular functionalities or uses of an element should be made available. And, section (c)(3), like section (d)(2)(B), speaks broadly in terms of providing access to "network elements," a term which is itself defined broadly to mean "a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions and capabilities that are provided by means of such facility or equipment." 47 U.S.C. § 153 (29). The ILECs would construe "network element" to mean only *limited* functions of a piece of equipment, and they would construe (c)(3) and (d)(2)(B) to require the unbundling only of particular functions or uses of network elements, rather than, as the statute says, the unbundling of the entire piece of equipment, including *all* of its functionalities. In sum, while the statute requires the Commission to consider the uses to which requesting carriers seek to put particular network elements, it does not require (or even suggest) that if a particular carrier needs a particular element for a particular purpose, it can use that element only for that purpose.

Telecommunications Act of 1996, CC Docket No. 96-98, FCC No. 99-238 (rel. Nov. 5, 1999) (*UNE Remand Order*). Thus, for example, SBC insists that the Commission engaged in such an inquiry in its analysis of circuit switching. SBC Comments 8-9. It points to the ruling that CLECs able to make use of EELs are not impaired without access to switches in certain situations while CLECs unable to use EELs would be impaired. But that part of the Commission's order considered the economies of scale generated by certain network configurations and the extent to which those economies made it practical for competitors to use their own switches. Nowhere in this analysis did the Commission consider the nature of the traffic that flowed through that network, or purport to limit the kinds of services CLECs could offer through EELs. Obviously, the Commission may consider network efficiency, economies of scale and scope, and the cost of self-provisioning in making its unbundling evaluations. It may be relevant to that analysis, for example, to make distinctions based on the size of the transport facility, since economic conditions may have enabled third parties to construct alternate facilities only of a certain size. But to say that the Commission can make distinctions in deciding which network elements to unbundle is not to say that it can impose a use restriction, which prohibits requesting carriers from using unbundled network elements to provide specified telecommunications services.

Third, the ILECs' construction renders the "impair" analysis practically unworkable. Each network element can serve a variety of different purposes. Lines can carry local, intraLATA toll, or interLATA services. They can carry POTS service or any of a variety of enhanced services. They can carry voice, data or signaling information. As a theoretical matter, it is possible to imagine an extensive grid in which each carrier's request to use a specific ILEC element for a specific purpose in a specific location could be evaluated. Each carrier could, as a theoretical matter, be asked to justify why it needed any particular element for any particular location for any particular purpose, and the right to lease would be limited to those specific uses in those specific locations as to which the necessary showing had been made. But it is hard to imagine how a CLEC would ever gain access to any element if a regulator had to make such a particularized finding.

Fourth, the ILECs' construction serves no useful purpose. Generally speaking, the network is dumb to the uses to which it is put. The same wire can carry local or long distance, data or voice. If only the ILEC has the wires necessary to accomplish one purpose, then (generally speaking) only the ILEC will have the wires necessary to accomplish another. Thus, if MCI WorldCom needs Bell Atlantic's transport facilities to carry local traffic from point A to point B, it will almost certainly also need those same Bell Atlantic transport facilities to carry interLATA toll traffic or interLATA traffic. A use-by-use inquiry generally would be pointless.

Fifth, precisely because the same wires can generally carry different kinds of traffic, and do carry all kinds of different traffic within the ILECs' own network, any rule that would allow CLECs to use the wires only for some kinds of traffic and not others would impose artificial and discriminatory network inefficiencies on CLECs. Indeed, as we show below, *see infra* pp. 24-25, that is exactly the effect of the ILECs' proposed "use restriction" here.

Sixth, a rule limiting the use to which a carrier puts leased facilities provides endless opportunities for the ILEC to deny access based on allegations that the CLEC is using the facility for some non-authorized purpose.[3/]

In sum, as the Commission has already correctly concluded, once the Commission determines that CLECs are impaired in their ability to provide the services they seek to offer without access to an ILEC element, both the statute and all policy considerations require that CLECs have access to that element to use as they see fit, for all telecommunications purposes, just as the ILEC uses that element.[4/]

II. CLECS ARE IMPAIRED IN THEIR ABILITY TO OFFER BOTH LOCAL AND LONG-DISTANCES SERVICES IF THEY ARE DENIED ACCESS TO ILEC TRANSPORT AND LOOP FACILITIES FOR THE PROVISION OF ACCESS SERVICES.

The principal thrust of the ILECs' submissions is that CLECs are not impaired if they are denied the ability to lease UNEs for access services. *See, e.g.,* SBC Comments 7-12; BellSouth Comments 20. For the reasons just stated, such use restrictions are unlawful, and the Commission has quite properly refused to consider "impairment" on a use-by-use basis. But

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3/ USTA's proposal implementing the FCC's proposed use restriction shows how any use restriction will be used to deny CLECs access to unbundled network elements. *See*, CC Docket No. 96-98, Feb. 10, 2000, Ex Parte letter from Lawrence Sarjeant to Magalie Roman Salas, attachment ("certification standards" that USTA proposes must be met before access service may be converted to UNEs pursuant to proposed Commission rule require for each line CLECs wish to convert that they provide proof that : CLECs provide one third of end user's local traffic; 50% of activated DS1 channels carry at least 5% local voice traffic; the entire DS1 facility carriers at least 10% local voice traffic; and, for each DS3 facility to qualify, CLEC must prove that all DS1 facilities on the DS3 meet each of these criteria. CLEC must also provide for each line: facility identification, the number of active channels, the percent of local traffic on each active channel of the facility, the number of local dial tones the CLEC is providing, and the total number of local dial tone lines at the end user's location).

4/ Of course, as Commission rules make clear, no carrier can use portions of the network in a way that causes harm to the network. The contours of that principle are not at issue here.

even if that were not so, and the Commission were to accept the ILECs' invitation to make such a calculation here, the *UNE Remand Order* compels the Commission to find that CLECs seeking to provide special access services *are* impaired without access to unbundled transport.

A. The Commission Has Already Found that Unbundled Loops and Transport Must be Provided Without Restriction.

A use-specific unbundling analysis would result in the conclusion that unbundled loops and transport must be provided to competitors seeking to provide special access services. The Commission would have to reach this conclusion for the simple reason that it has already found, in the *UNE Remand Order*, that ILECs must provide unbundled loops and transport without exception.

If there are insufficient lines from some ILEC serving wire centers to IXC POPs to conclude that CLECs without access to ILEC facilities will not be able to provide the "services they seek to offer," as the Commission previously concluded, *UNE Remand Order* ¶ 348, it necessarily follows that there are insufficient lines from some ILEC serving wire centers to IXC POPs to conclude that CLECs without access to those ILEC facilities will be unimpaired in their ability to provide *access* services. For these purposes, a line is a line, and if it is not there for one purpose, or for any purpose, then it is not there for purpose of providing access services. The Commission's conclusion that the uncertainty surrounding the obtaining of rights of way, and the delays inherent in construction, leave CLECs without access to ILEC lines impaired applies with full force when considering specifically the use of transport for access services. The Commission cannot now carve out an exception for special access, particularly since it has promised that it will not modify the list of network elements for another three years.[5/]

5/ *UNE Remand Order* ¶¶ 150-151.

That being so, their claims to the contrary notwithstanding,[6] the arguments the ILECs are making in this proceeding are necessarily nothing more than a repackaged version of arguments the ILECs made, and the Commission rejected, in the first phase of this proceeding. And, with only limited exceptions, the "facts" the ILECs submit in support of their arguments are the same as those the Commission found unconvincing in the first phase of this proceeding.

Loops. Even if the Commission were to conduct a special access-specific impairment analysis, it would find that competitors seeking to provide special access services would be impaired without access to unbundled loops. To the extent that there is anything distinctive about loops that are used for special access, it is that these loops tend to be higher-capacity loops and tend to be provisioned in urban areas to business customers. But the Commission has already rejected, in the *UNE Remand Order*, the ILEC argument that it should restrict the availability of higher-capacity business customer loops in urban areas. In particular, the Commission rejected ILEC arguments that it (1) restrict access to high-capacity loops (DS1 and above) serving business customers in urban areas;[7] and (2) restrict access to loops serving "larger" business customers in Special Access pricing zones 1 and 2.[8]

Transport. Even if the Commission were to conduct a special access-specific impairment analysis, it would find that competitors seeking to provide special access services

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6/ The ILECs assert that in the *UNE Remand Order's* analysis of dedicated transport, the Commission addressed exclusively the use of transport "to provide ubiquitous local exchange or xDSL services." SBC Comments 7. This is simply not so. As we explained above, the Commission never considered the availability of elements in terms of the uses to which they could be put, and instead quite properly considered their availability for all purposes. Indeed, the Commission explicitly considered routes over which access traffic travels, and concluded that CLECs would be impaired if they were deprived access to facilities that carried traffic over these routes. *UNE Remand Order* ¶ 348.

7/ *Id.* ¶¶ 176-177; 184-187.

8/ *Id.* ¶ 185.

would be impaired without access to unbundled transport. First, that is what the Commission found about transport generally,[9] and the ILECs use the same transport network for special access traffic and all other kinds of traffic. Second, to the extent that there is anything distinctive about transport used for special access services, it is that special access services tend to be provided among larger wire centers in urban areas. This characteristic of special access services does not, however, provide any support for the ILECs' unbundling arguments. In the *UNE Remand Order*, the Commission specifically considered, and rejected, the ILEC argument that transport links connecting "dense" wire centers should not be unbundled.[10] And the Commission rejected the ILECs' argument that it should not unbundle the transport links connecting serving IXC POPs to serving wire centers, which are among the largest offices.[11]

B. The Pricing Flexibility Order Is Irrelevant to an Impairment Analysis.

The ILECs rely extensively on data and conclusions drawn from the Commission's *Pricing Flexibility Order*. But the Commission has already rejected the ILECs' argument that this Order should "inform" its impairment analysis. As the Commission noted in the *UNE Remand Order*, the pricing flexibility rules "do not . . . describe market conditions where

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9/ *See, e.g., id.* ¶ 333 ("the competitive transport facilities that currently exist do not interconnect all of an incumbent LEC's central offices and all interexchange carrier's points of presence within an MSA, or a substantial portion thereof"); *id.* ¶ 343 ("there are few, if any alternative transport facilities outside the incumbent LECs' networks that connect all or most of an incumbent LEC's central offices and interexchange carriers' points of presence within an MSA").

10/ *Id.* ¶ 333.

11/ *See, e.g. id.* ¶ 348 ("we cannot conclude, based on the record before us, that the competitive entrance facility market is providing requesting carriers with effective alternatives to unbundled transport for all, or substantially all of the routes requesting carriers would need in order to provide the services they seek to offer").

requesting carriers would not be impaired without access to unbundled transport."[12/] Furthermore, the Commission concluded that CLECs would be impaired if forced to purchase access services instead of UNEs, because "the price differentials between TELRIC-priced transport and special access may persist for an indefinite period of time because the differential between unbundled transport and retail special access services are significant." *Id.*

The *Pricing Flexibility Order*'s tests were adopted primarily because they were administratively easy to apply; they do not permit evaluation of cost, timeliness, ubiquity, or other criteria considered under the Commission's impairment framework.[13/] The only thing that the pricing flexibility tests measure is the number of offices in which a single competitor has collocated. To attach any weight to the pricing flexibility rules' "one competitor"-based tests would be completely inconsistent with the *UNE Remand Order*'s rejection of any unbundling test that "triggers elimination of an incumbent LEC's unbundling obligation based on the presence of a single competitor that has self-provisioned transport in a particular market."[14/]

Furthermore, the pricing flexibility tests do not provide a reliable picture of the scope of competitive facilities in an MSA. First, with respect to loop facilities, the pricing flexibility tests do not directly measure the scope of CLECs' loop deployment, relying instead on a collocation-based proxy. The Commission has already acknowledged "the shortcomings of collocation as a measure of competition for channel terminations between end offices and customer premises."[15/]

12/ *Id.* ¶ 341 n.673.

13/ *Id.* ¶ 132.

14/ *Id.* ¶ 344.

15/ Fifth Report and Order and Further Notice of Proposed Rulemaking, *In re Access Charge Reform*, 14 F.C.C.R. 14221 ¶ 103 (1999) (*"Pricing Flexibility Order"*).

Second, with respect to transport facilities, the *Pricing Flexibility Order*'s collocation-based tests are potentially misleading. These tests do not, as the ILECs seem to suggest, measure the transport revenues "addressable" by competitors. When the ILECs report the percentage of revenues "covered by collocation arrangements,"[16/] they are computing these percentages using a formula specified in Section 69.725 of the Commission's rules. Because of the way this rule attributes revenues to particular central offices, it generates a revenue figure that is generally much larger than the addressable revenues.[17/]

C. There is No Inconsistency Between CAPs' Market Position and a Finding of Impairment with Respect to Loops and Transport.

In making their impairment arguments, the ILECs generally decline to address cost, timeliness, or other criteria that must be considered under the Commission's impairment analysis. Recognizing that the Commission has already examined these factors in the *UNE Remand Order*, and has rejected their arguments,[18/] the ILECs instead make the bald assertion that (1) CLECs have achieved a 33 percent share of the special access market; and (2) the "success" of CLECs in achieving this market share "would seem to prove that their networks are

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16/ *See, e.g.*, USTA Fact Report 8-9.

17/ The Section 69.725 revenue attribution rule specifies that the ILECs should attribute one-half of the revenues from a transport link to the office at each end of the transmission path. Generally, this formula results in a revenue figure that is larger than the addressable revenue. As a simple example, consider an MSA with four central offices. Suppose there is competitive transport from an IXC POP to one central office, and assume that this entrance facility route represents 25% of the total of entrance facility and interoffice revenues. Under Section 69.725, collocation at this office would allow the ILEC to claim credit for the entrance facility revenues that are addressable (25% of the total revenues) *and* one-half of the interoffice revenues (*i.e.*, one-half of 75% of the total, or 37.5%). Thus, for this MSA, Section 69.725 would attribute 62.5% of the ILEC's special access revenues to offices with collocation, even though only 25% of the ILEC's revenues are addressable by a competitor.

18/ *See UNE Remand Order* ¶¶ 332-333, 340, 343, 346.

'practical, economic, and operational' substitutes for incumbent LEC networks."[19/] The implied inconsistency between CLECs' market position and the *UNE Remand Order*'s impairment analysis, however, simply does not exist.

1. The ILECs Have Exaggerated CLECs' Market Position.

The ILECs' claim that CLECs' special access revenues grew to $5.7 billion in 1999, and that CLECs have therefore achieved a market share of 33 percent, is simply without foundation. This claim is based on a proprietary study conducted by a private firm using methodologies that cannot be verified. The Commission should attach no weight to this firm's estimates, given that its past studies have produced results that are completely inconsistent with the Commission's data. In 1998, for example, while the Commission reported that CLECs had approximately $1.2 billion in special access and private line revenue,[20/] the market research firm used by the ILECs' reported a figure of $2.5 billion[21/] -- more than twice the actual figure.[22/]

19/ BellSouth Comments 24.

20/ *Local Competition: August 1999*, Industry Analysis Division, Common Carrier Bureau (summing line 24 for non-ILECs on Table 2.3 and line 36 for non-ILECs on Table 2.4).

21/ *USTA Fact Report* at 6.

22/ The ILECs argue that the two figures can be reconciled if one assumes that the $1.9 billion in "local" revenues reported by IXCs in 1998 are local private line and special access revenue. *USTA Fact Report* at 6 n.31. But it is clear from the *Local Competition: August 1999* report that the ILECs' assumption is wrong. The *Local Competition: August 1999* report shows that the $1.9 billion in "local" revenues reported by IXCs in 1998 consisted entirely of $1.2 billion in PICC pass-through charges and $700 million in miscellaneous local exchange revenues. *Local Competition: August 1999* Table 2.4, "toll" column, lines 34 and 35. *See also Local Competition: August 1999*, Table 2.1, note ****. IXCs' reported local private line and special access revenue is shown separately in the *Local Competition: August 1999* report at Table 2.4, line 36, "toll" column and Table 2.3, line 24, "toll" column.

The ILECs also suggest that the facilities that have been constructed by CLECs are sufficient to address a significant portion of the special access market.[23/] But CLEC fiber currently connects to no more than 5-10 percent of buildings with special access customers, based on the record developed in last year's U S WEST Phoenix and Seattle forbearance proceedings.[24/] And, the majority of ILEC central offices that serve special access customers have no collocated competitive transport.[25/] CAPs are typically able to provision no more than the "entrance facility" portion of a special access circuit, between the IXC POP and the ILEC serving wire center.

23/ BellSouth Comments at 3 ("In specific geographic areas, the Commission should recognize that fifteen years' worth of CAP and CLEC investment in access facilities means that carriers can – and do – offer these services without any need for incumbent facilities.").

24/ U S WEST reported that it provided "high-capacity" (DS1 and above) special access service to 3,101 locations in the Phoenix MSA (*see* Petition of U S West Communications, Inc. for Forbearance, CC Docket No. 98-157, August 24, 1998, Attachment B, at 3). U S WEST also reported that CLEC networks connected to approximately 200 buildings in the Phoenix MSA, assuming some overlap between CLEC networks (*see* U S WEST Petn at 14-16). Thus, CLEC networks connected to no more than 6 percent of the "high-capacity" special access locations in the Phoenix MSA. If locations served by voice grade or other "low-capacity" special access services were taken into account, the percentage would be lower.

Similarly, U S WEST reported that it provided "high-capacity' special access service to 2517 locations in the Seattle MSA (*See* Petition of U S WEST Communications, Inc. for Forbearance, CC Docket No. 99-1, December 30, 1998, Attachment B, at 3). U S WEST also reported that CLEC networks connected to approximately 200 buildings in the Seattle MSA, assuming some overlap between CLEC networks (*see* U S WEST Petn at 14-16). Thus, CLEC networks connected to no more than 8 percent of the "high-capacity" special access locations in the Seattle MSA. If locations served by voice grade or other "low-capacity" special access services were taken into account, the percentage would be lower.

25/ According to Bell Atlantic, 60 percent of its central offices have some special access revenues. Bell Atlantic Comments at 4. Since Bell Atlantic has 2418 wire centers (*see UNE Fact Report* at II-8, Table 2, attachment to USTA Comments in CC Docket No. 96-98, May 26, 1999), this means that approximately 1450 Bell Atlantic wire centers have some special access revenues. However, Bell Atlantic has reported that only 359 wire centers in its region have collocation (*Id.*), and not all of these have competitive fiber. It is clear, therefore, that the vast majority of Bell Atlantic offices with special access revenues have no competitive fiber.

Due to the limited scope of existing facilities, lack of access to unbundled transport and loop elements would "materially diminish" a competitor's ability to provide special access service. Beyond the 5-10 percent of buildings currently connected to CLEC networks, CLECs face substantial issues of cost and timeliness in self-provisioning facilities. As the Commission recognized in the *UNE Remand Order*, the costs of self-provisioning include the cost of the fiber, the cost of deploying fiber in public rights of way, and the cost of trenching. Factors affecting timeliness include the time required to secure access to rights-of-way, pole attachments, and conduit space.[26/]

2. CLEC Market Share Gains Are Not Inconsistent with a Finding of Impairment.

Even if CLECs have achieved some modest market share gains in the special access market without widespread use of unbundled elements, this is not inconsistent with the Commission's impairment findings. First, as the Commission found in the *UNE Remand Order*, the fact that competitive LECs have found it economical to serve *certain* customers using their own facilities tells nothing about the cost of serving other customers.[27/] Specifically, CLECs' network construction to date says nothing about CLECs' ability to expand their networks on lower-density and longer-distance (and therefore higher-cost) routes. To date, CLECs' initial entry has focused on the very highest-density and shortest-distance (and therefore lowest-cost) routes.

26/ *UNE Remand Order* ¶¶ 186-187.

27/ *Id.* ¶ 184 ("this evidence tells us nothing about the customer the competitor would like to serve but cannot"); 333; 340 ("The alternatives cited in the evidence submitted by the incumbents are not ubiquitously available . . . ."); *id.* ¶ 348.

Second, CLECs have achieved a portion of their market share gains by relying on the availability of ILEC special access services – a factor that is given no weight in the Commission's impairment analysis.[28/] Beginning with the adoption of the Commission's expanded interconnection orders, CLECs have relied on ILEC special access services to "fill in" the gaps in their networks. Under the expanded interconnection model of special access competition, channel terminations, multiplexing, and, in many cases, interoffice transport are obtained from the ILEC's special access tariff. The CLEC can either resell the ILEC's services to the customer, or the customer can order the ILEC portions of the circuit directly from the ILEC. In either case, the CLEC competes only for a portion of the circuit, and is able to do so only because ILEC special access services are available for the remainder of the circuit.

As previously indicated, *see supra* p. 10, the Commission has consistently rejected ILEC arguments that its impairment analysis should take into account the availability of these ILEC special access services.[29/] The Commission has noted, in particular, that the Supreme Court required that the unbundling analysis compare unbundled network elements with "self provision, or with purchase from *another* provider," not ILEC retail services.[30/] With the passage of the Telecommunications Act of 1996, CLECs now have the right to obtain an unbundled element when lack of access to that element would "materially diminish" the CLEC's ability to provide

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28/ *Id.* ¶ 354 ("If we were to adopt the incumbents' approach, the incumbents could effectively avoid all of the 1996 Act's unbundling and pricing requirements by offering tariffed services that, according to the incumbents, would qualify as alternatives to unbundled network elements. This would effectively eliminate the unbundled network element option for requesting carriers, which would be inconsistent with Congress' intent to make available to requesting carriers three different competitive strategies, including access to unbundled network elements.").

29/ *Id.* ¶ 354.

30/ *UNE Remand Order* ¶ 70.

the services it seeks to offer. The expanded interconnection model of special access competition is no longer sufficient.

III. LOOP/TRANSPORT COMBINATIONS ARE GOOD POLICY.

A. Unbundled Loop/Transport Combinations will Spur Competition and Facilities Construction.

The ILECs insist that the use of UNEs to provide access services will bring the construction of new access facilities to a "screeching halt." SBC Comments 14. But the Commission has already concluded as a general matter that "competitive LECs prefer to use their own facilities or alternatives outside of the incumbent's network when they are able to do so, in order to reduce their reliance on a primary competitor." *UNE Remand Order* ¶ 112. The Commission found that "use of the incumbent LEC's network elements requires competitive LECs to disclose details about their customers to their chief competitor," and that "competitive LECs would prefer to have direct control of their networks to ensure the quality of their service." *Id.* Addressing specifically the claim that unbundling will deter the construction of competing transport facilities, the Commission concluded that "the allegations of the competitive harms resulting from a uniform transport unbundling obligation are overstated. We believe that there are significant operational and technical incentives for a requesting carrier to eliminate its reliance upon transport provided by incumbent LECs over the long term." *Id.* ¶ 368.

As we previously discussed, *see supra* pp. 12-16, the ILECs are correct that "in areas of concentrated business demand," Bell Atlantic Comments 11-12, there has been some progress in the development of a more competitive market. The appropriate question is whether leasing at UNE rates will have a detrimental effect on construction in that segment of the market, and whether it will have any effect at all on construction in the less concentrated segments of the market.

As to the former, in those areas of most highly concentrated business demand, the availability of unbundled elements will clearly have only limited effect on CLECs' construction decisions. After all, CLECs have already been able to construct networks to serve many of the very largest LEC end offices efficiently. Given this competitive entry, it is not surprising that the differentials between UNE prices and the ILECs' special access tariffs are smallest for very high-capacity, low-mileage circuits such as entrance facilities.

The great majority of central offices that do not serve the most concentrated business districts present a different picture, however. Competitors cannot always efficiently construct their own facilities in these areas of less concentrated demand. At a minimum, as discussed in more detail below, CLECs face significant economies of scale disadvantages. Not surprisingly, it is in these areas where there has been the least amount of competitive facilities construction. And, not coincidentally, it is for higher mileage DS1 and below circuits where the difference between UNE prices and the ILECs' special access tariffs is greatest. In these areas, where competitors have not been able to economically construct competitive facilities even when faced with the ILECs' monopoly-priced access services, unbundled elements can only *encourage* facilities construction and ensure that special access rates move towards competitive levels.[31/]

31/ Neither is it in the public interest to encourage the construction of alternative facilities that are necessary only because the ILECs are allowed to price their bottleneck facilities substantially above cost. The ILECs assert that regulatory policies that keep transport prices high benefit the public by forcing competitors to "innovate in new technologies that will distinguish their services from those of the incumbent." U S WEST Comments 19 n.47. *See also* Bell Atlantic Comments 10. But at the same time they argue that the CLECs' interest in providing new and innovative services will *not* lead them to build otherwise duplicative facilities since, "[w]hen it comes to transport facilities" they are "largely fungible." SBC Comments 12 n.19. Inefficient construction of alternative transport facilities caused by ILEC monopoly pricing simply results in the needless digging up of roads and wasted capital expenses that could otherwise be invested in new and innovative technologies.

Indeed, the Commission has already found, in the *UNE Remand Order*, that unbundled loops will encourage facilities-based special access competition. The Commission stated that "the prospect of competition among carriers to provide [special access] services over the loop at prices that more closely reflect the provider's costs seems to us to accord fully with Congress's intent in passing the 1996 Act."[32/]

Combinations of loop and transport will encourage special access competition in situations where neither self-provisioning nor obtaining transport facilities from third-party sources is an adequate alternative to the ILEC's ubiquitous network. To obtain access to unbundled loops, which the Commission has found to facilitate competition in the special access market, competitive providers require transport to the ILECs' end offices. As was discussed above, however, *see supra* pp. 12-14, the majority of ILEC end offices that serve special access customers currently have no competitive transport. Unbundled transport, combined with unbundled loops, will encourage the development of special access competition for end users served by these offices and will encourage the construction of competitive transport links to these offices.

As the Commission discussed in the *UNE Remand Order*, a CLEC will incur substantial fixed costs when building a transport link to an ILEC end office.[33/] When the facility is first constructed, and the CLEC's traffic density on that transport route is low, the CLEC's per-unit costs on that route will be substantially higher than the ILEC's per-unit costs.[34/] In the past, CLECs have to some extent been able to minimize the ILECs' economies of scale advantage by

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32/ *UNE Remand Order* ¶ 177.

33/ *Id.* ¶¶ 355-356.

34/ *Id.* ¶ 76.

focusing their network construction on higher-density and shorter-distance routes. CLECs have, for example, focused on constructing entrance facility links to the very largest end offices in the urban core and, in some cases, buildings with large volumes of traffic.

Further CLEC network expansion will, however, generally involve lower-density, higher-cost routes than has been the case to date. In evaluating whether to expand their networks to additional end offices, CLECs typically compare their projected costs - - construction costs and collocation costs - - with the expected traffic demand. On lower-density routes, the business case for facilities construction is more likely to be affected negatively by CLECs' economies of scale disadvantages than has been the case with competitive transport links constructed to date. The fixed cost of construction tends to be higher on these routes, because the distance between offices tends to be greater than in the urban core. And the CLEC's expected demand tends to be lower, because the route's traffic density is lower.

By allowing CLECs to share in the ILEC's economies of scale, unbundled transport/loop combinations will spur the construction of competitive facilities on these lower density routes. As the Commission discussed in the *UNE Remand Order*, "leasing the incumbent's unbundled transport facilities is likely to be significantly less costly than deploying one's own transport facilities when the competitor has a relatively small volume of traffic . . . ."[35/] By using unbundled transport initially, the CLEC can acquire sufficient customers to justify the construction of transport facilities of its own.[36/]

35/ *Id.* ¶ 76.

36/ *UNE Remand Order* ¶ 80.

B. Loop/Transport Combinations will Encourage Real Price Competition.

By combining their existing facilities with unbundled elements, CLECs can bring broad competition to the special access market. There is simply no merit to GTE's claim that making unbundled elements available to competitors would be "counter-productive" because special access rates are "already subject to significant competitive discipline."[37/]

All evidence indicates that except in a few highly dense areas served by high capacity, low milage circuits, special access rates are *not* subject to significant competitive discipline. First, as the ILECs acknowledge, current special access rates are generally far above TELRIC. Second, all of the price cap ILECs are currently pricing their trunking basket services at the maximum permitted by the Commission's price cap rules. Third, ILEC special access rates have not decreased, and have in many cases actually increased, over the past three years -- a period of supposedly intensifying competition.

The table below compares each RBOC's June 30, 1997 Service Band Index (SBI) for the DS1 and DS3 service categories with the current SBIs for these service categories. The SBI, which is used in the Commission's price cap system, is an index of the ILEC's prices for a particular service category. As is shown by the Table, competition is hardly constraining the ILECs' prices: the ILECs' DS3 rates have generally declined only slightly in the last three years, and many ILECs' DS1 rates have actually *increased.*

37/ GTE Comments 6.

RBOC DS1 AND DS3 SBIs: 6/30/97 vs. CURRENT

	DS1 SBI 6/30/97	DS1 SBI Current	DS3 SBI 6/30/97	DS3 SBI Current
Ameritech	74.3389	89.1436	67.3584	69.5679
BA-North	72.7855	76.3921	73.7622	73.1111
BA-South	74.8858	76.3921	70.1230	73.1111
BellSouth	81.2800	85.1290	78.6567	75.5424
Pacific	74.3895	72.2999	71.0756	65.8359
SWBT	73.5939	74.6934	77.8090	73.6325
U S West	81.5777	85.1944	88.6471	101.0466

The ILECs' pricing behavior confirms that only limited price competition can develop if CLECs do not have access to unbundled loops and transport. The Table shows, in particular, that the price cap ILECs have actually been *increasing* rates for less-competitive DS1 services (and also for sub-DS1 services[38/]). The modest reductions in DS3 rates mainly reflect reductions in the ILECs' rates for DS3 and even higher capacity entrance facility services, for which there are some competitive alternatives.

Unbundled loop/transport combinations would generate the kind of broad-based special access competition that has not been possible under the expanded interconnection model. Loop/transport combinations would bring competition to the lower-density routes that have, until now, been largely insulated from competitive pressures -- even after fifteen years of CLEC network construction.

38/ Comparing SBIs for the "Voice Grade" service category over the same time period shows that every RBOC but Pacific Bell has increased its rates for voice grade special access services.

C. Unbundled Elements Would Safeguard Competition in the Special Access Market.

If CLECs are unable to obtain unbundled loops and transport, the recent *Pricing Flexibility Order* will open the door to ILEC anticompetitive behavior in the special access market. Without unbundled elements, CLECs would have to continue relying on ILEC special access services to "fill out" their networks. As the Commission found in the *UNE Remand Order*, one of the risks of forcing competitors to rely on ILEC retail services is that "competitors would have no assurance that the incumbent LEC would not change the tariff in such a manner that the competitive LEC could no longer rely on it to provide the services it seeks to offer."[39/] The *Pricing Flexibility Order* heightens the risk of such tactics.

If an ILEC qualifies for Phase II pricing flexibility, and can remove its special access rates from price cap regulation, the ILEC could increase the rates for those special access services that are often used by CLECs to "fill in" the gaps in their networks. By definition, the services that CLECs would need to fill in the gaps in their networks are those for which the ILEC will enjoy the greatest pricing power. The Commission has acknowledged, on several occasions, that the Phase II pricing flexibility test does not guarantee that all rates are at TELRIC[40/] or that all services are subject to effective competition.[41/] As a result, CLECs will face a substantial risk that ILECs will increase the rates charged to CLECs for less-competitive services such as channel terminations and interoffice transport on less-dense routes.

39/ *UNE Remand Order* ¶ 69.

40/ *Id.* ¶ 341 n. 673.

41/ *Pricing Flexibility Order* ¶ 155 ("We recognize that the regulatory relief we grant upon a Phase II showing may enable incumbent LECs to increase access rates for some customers.").

At the same time, the *Pricing Flexibility Order* also gives the ILECs the ability to use contract pricing selectively to reduce special access rates to valuable customers. CLECs could then be squeezed from "above" by selective ILEC price cuts and from "below" by increased prices for channel terminations and other key inputs. Such tactics would both undermine existing competition in the special access market and discourage further CLEC facilities construction. The only way to prevent such anticompetitive ILEC pricing behavior in the post - *Pricing Flexibility Order* environment is to ensure that CLECs are able to obtain unbundled elements at TELRIC, and are not forced to rely on ILEC special access services.

D. Use Restrictions Harm Local Competition.

The ILECs' proposal also would seriously impair CLECs' ability to provide local service. As the Commission has repeatedly acknowledged, the costs of telecommunications services are greatly influenced by economies of scale. Specifically, "purchasing transport capacity is generally less expensive at higher levels of capacity." *UNE Remand Order* ¶ 358. GTE, BA-NY and other ILECs for that reason do not artificially segregate their access and local traffic onto separate transport networks, but use their networks as efficiently as possible, aggregating as much traffic as is practical onto the largest-sized pipe that can be efficiently utilized.

MCI WorldCom would like to do the same. While it will not in the short or medium term be able to generate the economies of scale enjoyed by the ILECs, by offering local, intraLATA toll and interLATA service to a broad base of customers, it hopes to be able to generate sufficient traffic of all types from central offices and serving wire centers to its POPs to benefit from the efficiencies that come from traffic volume. All use restrictions prevent that from happening, by forcing it to segregate local traffic on UNE transport, and access traffic on ILEC access services.

Indeed, such inefficiencies are the unavoidable effect of *any* use restriction. They therefore deter local competition every bit as much as they burden long-distance competition.

Thus, as GTE candidly admits, it embraces use restrictions in part because they prevent "IXCs [from] combin[ing] all their terminating traffic to an area over the UNE facilities," thereby "keep[ing] terminating state and interstate traffic separate." Comments 13. Where MCI WorldCom might otherwise be able to operate with just one DS1 or one DS3 to carry both local and access traffic, today it must purchase two. If it could enjoy the network efficiencies that the ILECs give to themselves, it could lower its cost of providing local service, just as it could lower its access costs. In that way, the proposed use restriction impairs MCI WorldCom's ability to provide local service in competition with the ILECs.[42/]

E. Unbundling UNEs for Access Services Will Not Affect Universal Service Subsidies, and Will Not Lead To a Sudden Loss in ILEC Revenues.

The ILECs continue to press their claim that the availability of UNEs for access service will lead to an "immediate, severe" decrease in revenues that are needed to support universal service reform. USTA Comments 14. *See also, e.g.,* BellSouth Comments 15, U S WEST Comments 16, SBC Comments 15. As MCI WorldCom indicated in its opening Comments, the sufficient answer to this is that it is "established Commission practice that special access will not subsidize other services," First Report and Order, *In re Access Charge Reform*, 12 F.C.C.R. 15982, ¶ 404 (1997) ("*Access Charge Reform Order*"). Nor is there any merit at all to the

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42/ MCI WorldCom could better obtain these network efficiencies if the ILECs would allow it to commingle local and access traffic on local or access facilities, paying a proportionate share of the UNE or access rate depending upon the nature of the traffic carried on the commingled facility. But most ILECs will not allow CLECs to commingle traffic, and those that do allow commingling insist that MCI WorldCom pay access rates even for the local UNE traffic carried on the access circuit. MCI WorldCom's longstanding complaint about these practices has not been addressed by the Commission. *See MCI Telecommunications Corp. v. Bell Atlantic*, FCC File No. E-98-33.

ILECs' claim that the use of UNEs for dedicated access would "substantially" reduce switched access revenues. U S WEST Comments 19. *See also, e.g.,* BellSouth Comments 15, GTE Comments 13. The calculations upon which the ILECs make this claim are based upon switched access costs in 1991. SBC Comments 16. But those costs have been greatly reduced, and the ILECs produce no evidence that under the current rates for switched access any significant number of customers will switch from switched to dedicated access once the latter service is available at a competitive price.[43/] Indeed, it is far more likely that lowered dedicated access prices will *increase* switched access revenues by lowering the price of a long-distance call.[44/] In fact, the only conclusion that can be drawn from the ILECs' claims about the effects of lowering the price of dedicated access is that they acknowledge that the savings involved will be directly passed on to the customer. This is a result the Commission should welcome, not act to prevent.

The ILECs' assertion that unbundling will undermine the Commission's access charge regime, *see, e.g.,* BellSouth Comments 2, is equally misguided, since competition through UNEs is an explicit part of that scheme. *See Access Charge Reform Order* ¶ 262 (if Commission promotes competitive market, access charges will come down to cost in part because "interstate access services can be replaced with some interconnection services with functionality offered by unbundled elements," and 1996 Act creates a cost-based pricing requirement for interconnection

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43/ Not only have switched access charges fallen considerably since the adoption of the 1997 *Access Charge Reform Order*, but the CALLS plan currently being considered by the Commission would reduce switched access charges still further. The plan, if adopted, would cut switched access rates to half their current levels, thus more than offsetting any effects that UNE-based competition in the special access market might have on the "crossover point." Furthermore, the CALLS plan addresses whatever "universal service" concerns the ILECs may have by creating a new $650 million universal service fund.

44/ For example, reduced prices for a business' dedicated access could stimulate growth in switched access minutes associated with toll free calling.

and UNEs.); *id.* ¶ 48 (intending to reduce access charges by "generat[ing] workable competition in the next several years"). *See also id.* ¶¶ 9, 35, 42, 280.

Equally fallacious is the ILECs' claim that the replacement of special access services currently purchased under tariff with cost-based UNEs would "subject ILECs to an immediate and dramatic loss of revenues."[45/] To support this claim, the ILECs rely on a *Special Access Fact Report*, that was submitted by USTA on behalf of Bell Atlantic, BellSouth, GTE, SBC, and U S West. That report provides unrealistically large estimates of the potential revenue effect on ILECs from the replacement of special access services with EELs. More critically, the report provides virtually no information on the assumptions or calculations behind the estimated revenue impacts. The failure to disclose those assumptions and calculations denies interested parties any opportunity to examine and comment on the report's methodology. Accordingly, the Commission should give no weight to the report's revenue impact estimates in its consideration of this matter.

The only description of the methodology used to develop the revenue impact estimates in the *Special Access Fact Report*, appears in a footnote.[46/] According to that footnote:

> The estimates in Tables 8 and 9 are based on internal data and calculations provided by the individual companies. These calculations used estimates of each company's rates of growth for special access; estimates of the difference between each company's special access rates and UNE rates; estimates of the impact of termination liabilities and long-term contracts in inducing customers to convert; and estimates of the offsetting impact of such termination liabilities where it was assumed that customers with long-term contracts would choose to convert.

While the confidential version of the report includes the output of the data and calculations mentioned in that footnote, it provides no information at all on the underlying data and

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45/ SBC Comments iii.

46/ USTA Fact Report 13 n.67.

calculations, or their underlying assumptions. Without knowing more precisely how the individual companies developed their estimated revenue impacts, it is difficult to judge the reasonableness of their methodology. For example, if the calculations used estimates of each company's rates of growth for special access, did those estimates disaggregate special access by type of customer?[47/] This is important because special access customers that are not telecommunications carriers, such as ISPs and other end users, are not entitled to request UNEs pursuant to section 251 of the Telecommunications Act. If, as is likely, ISPs account for an increasing proportion of the ILECs' special access revenues, then failure to disaggregate by customer type will cause the rate of growth estimates greatly to overstate the impact of EELs on ILEC revenues.

The report also fails to indicate whether it accounts for a number of other potentially significant issues that should temper the revenue impact of any conversion from special access to EELs. First, the estimates do not appear to consider the extent to which special access is used to provide traditional local exchange services. This is important because the use restriction described in the FNPRM, even if it were lawful, would not prevent the conversion of special access services that are used to provide traditional local exchange services. MCI WorldCom believes that this use accounts for a significant and growing portion of the ILECs' special access revenues.[48/]

47/ ILEC price cap filings show that approximately 20% of ILEC special access revenues come from services sold directly to end users. Unless the estimates in the *Special Access Fact Report* exclude these revenues from their underlying calculations, they will significantly overstate ILEC revenue losses.

48/ Approximately ** ** of MCI WorldCom's special access costs are associated with circuits ordered to provide traditional local exchange services.

Second, the *Special Access Fact Report* does not appear to eliminate from its estimates those special access circuits that are cross-connected in a collocation and include no channel mileage. These channel terminations can be replaced with unbundled loops without transport, and the use restriction on EELs under consideration by the Commission would have no impact on the ability of carriers to convert these services to unbundled loops. Accordingly, these circuits must be backed out of any estimate of the revenue impact of a conversion of special access services to EELs. In some metropolitan areas, these circuits are likely to account for a significant percentage of ILEC special access revenues.[49/]

Third, the *Special Access Fact Report* does not appear to eliminate from its estimates entrance facilities that IXCs require to provide switched access services. These high capacity links connect IXC POPs with ILEC serving wire centers. Since they do not include an end user channel termination, they cannot be replaced with EELs. MCI WorldCom estimates that entrance facilities account for at least 15% of ILEC special access revenues.

Fourth, the *Special Access Fact Report* does not describe the manner in which the individual ILECs calculated the difference between UNE and special access pricing. It appears that they may have calculated an average discount and applied that average discount to their entire special access revenue base. If so, they have grossly overstated the potential revenue impact from any conversion. Not only would such a methodology include a vast number of circuits which cannot be converted for the reasons described above. It would also overstate the revenue impact even for those circuits for which a conversion is theoretically possible. This is so because the actual discount varies widely on a circuit-by-circuit basis. In general, the discount is

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49/ According to the *Special Access Fact Report*, in the 182 MSAs that generate 88% of all RBOC/GTE special access revenue, one or more collocation arrangements exist in wire centers that cover at least 30% of the ILEC's special access revenues in those MSAs.

greatest for DS1 circuits that include a significant mileage component. Conversely, the discount for DS3 circuits is, in general, significantly less. The use of an average discount would misleadingly suggest the conversion of many circuits that in fact would not be candidates for conversion. Moreover, the use of an average discount may not appropriately account for existing discounts for volume and term commitments. If carrier customers make greater use of volume and term discounts than end user customers, as seems likely, then the average discount will overstate the actual discount available to those customers eligible to request UNEs.

It is impossible to determine precisely how the *Special Access Fact Report* addresses each of the issues described above. In many cases, it may not account for them at all. MCI WorldCom's own estimates of its potential savings from converting special access to EELs are substantially out of proportion to the individual company estimates included in the report.[50/] For example, the *Special Access Fact Report* estimates that Bell Atlantic would suffer a net revenue loss of ** ** in the first year following a conversion. Yet in September, MCI WorldCom determined that conversion of existing DS1s to EELs in Bell Atlantic's territory would result in a net year one loss to MCI WorldCom of approximately ** ** .[51/] It is not possible to reconcile these two figures. It is simply not credible that Bell Atlantic would suffer the net revenue loss estimated in the *Special Access Fact Report*, given that MCI WorldCom would in all likelihood decline to convert its substantial base of DS1s. The more likely explanation is that the *Special*

50/ CC Docket 96-98, Sept. 8, 1999, Ex Parte Letter from Brad Stillman to Magalie Roman Salas, ILEC Revenue Losses Resulting From Nondiscriminatory Access To Unbundled Enhanced Extended Link, p. 5.

51/ That loss reflects the excess of the termination liabilities that MCI WorldCom would incur over the annualized savings of EELs over special access.

Access Fact Report is based on a simplistic methodology that substantially overestimates ILEC revenue losses.

The ILECs have not proved their case, and have likely grossly overstated their possible revenue losses from any use restriction on EELs. The *Special Access Fact Report* fails to provide the critical data, calculations, and assumptions upon which it is built. The Commission should disregard that report and conclude that ILEC revenue losses are likely to be substantially less than the estimates provided in that report. Indeed, if demand for high-bandwidth circuits is elastic, any price reduction could well increase ILEC revenues.

Respectfully submitted,

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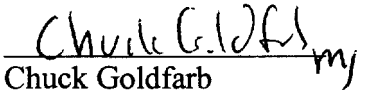

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Dated: February 18, 2000

CERTIFICATE OF SERVICE

I, Mark D. Schneider, hereby certify that I have this 18th day of February, 2000, caused a true copy of Reply Comments On Fourth Further Notice of MCI WORLDCOM, Inc. to be served on the parties listed below via first class mail postage pre-paid:

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